Premalla a/p Navanthapany Samy v Tetuan Othman Hashim & Co (a firm) & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCvC)(W)-2454–12 OF 2022
KAMALUDIN MD SAID, SEE MEE CHUN AND HASHIM HAMZAH JJCA
21 MAY 2024

Evidence — Admissions — Admission of liability — Appellant alleged that there was admission of liability by second respondent in proposed settlement given via email and WhatsApp ('documents') — Proposed settlement did not materialized — Whether appellant could rely on contents of documents to establish admission of liability — Whether there was admission of liability — Whether documents and its contents admissible

Evidence — Credibility — Witness — High Court's finding on credibility and demenour of witnesses — Judicial commissioner found that appellant's witnesses were not credible — Whether finding of judicial commissioner on credibility of witnesses plainly wrong

Legal Profession — Duty of care — Professional negligence — Breach of fiduciary duty — Claim for loss of chance — Appellant's suit for declaration that appellant was rightful owner of land was dismissed by High Court — Appellant's counsel advised appellant not to appeal — Appellant filed suit against appellant's counsel for professional negligence, breach of fiduciary duty and loss of chance — Judicial commissioner dismissed appellant's suit — Whether judicial commissioner erred in finding that appellant's counsel had not acted in breach of duty of care and fiduciary duty towards appellant — Whether judicial commissioner wrongly applied doctrine of loss of chance in holding that appellant would not have succeeded in her appeal even if an appeal was filed against High Court's decision — Whether appellant's counsel had acted below required standard of care of a reasonably competent advocate and solicitor

Via a sale and purchase agreement ('the SPA'), the appellant agreed to purchase a piece of land ('the land') from one Normawati. However, prior to the signing of the SPA, Normawati had already charged the land to RHB Bank Bhd ('RHB') as security for a loan and when Normawati defaulted on her loan, RHB had proceeded with the foreclosure of the land. RHB had successfully auctioned off the land to My Home Properties Sdn Bhd ('MHP'). To settle this dispute, the appellant had engaged the second respondent as her counsel. The

second respondent was a partner in Tetuan Othman Hashim & Co ('the first respondent'). The second respondent then filed two actions on behalf of the appellant. The first action ('the initial suit') was for specific performance of the SPA and this action ended in favour of the appellant. The second action was against MHP for a declaration that the appellant was the rightful owner of the said land and MHP had also filed a separate suit claiming ownership of the land ('collectively referred to as 'the subsequent suits'). For the subsequent suits, the court found in favour of MHP, but the respondents advised the appellant not to appeal against the said decision. The appellant then filed a suit against the respondents for professional negligence, breach of fiduciary duty and loss of chance allegedly suffered by the appellant as a result of the respondents' advice, which was claimed to be against the appellant's best interest as their client. The learned judicial commissioner ('the JC') dismissed the appellant's suit, hence the present appeal. There were three issues to be determined by the court. Firstly, in relation to professional negligence, the appellant relied on a meeting between the appellant and the second respondent ('the said meeting'), an email appending a draft statutory declaration ('SD') as well as a WhatsApp message from the second respondent to the appellant's husband which showed that the second respondent agreed to compensate the appellant of the current market value of the land if the appellant agreed not to appeal against the decision in the subsequent suits. The appellant argued that the second respondent had agreed to compensate the appellant monetarily for not appealing against the decision in the subsequent suit because the second respondent wanted to avoid the High Court's written judgment that the second respondent had committed fraud by not disclosing the successful auction of the said land to MHP before the judgment was pronounced in the initial suit. In other words, the advice given by the second respondent was not based on his duty to act in the best interest of the appellant as his client. Secondly, in relation to the issue of loss of chance or opportunity, the appellant submitted that the appellant had a chance of success if an appeal was filed. The last issue was whether there was a breach of fiduciary duty by the respondents against the appellant.

Held, dismissing the appeal with costs of RM15,000 to the respondents subject to allocator, and affirming the decision of the High Court:

(1) Regarding the said meeting, the JC found that the evidence from the appellant's witnesses was not credible. It was trite that the learned JC, as the trial judge, had the advantage of seeing and hearing the witnesses and was entitled to his finding as to their demeanour and credibility. This was a benefit that the present court, as an appellate court, did not have. It was also trite that the finding of the trial judge as to the demeanour and credibility of the witnesses' evidence ought not to be disturbed unless the appellate court was convinced that the finding was plainly wrong. There was nothing before the court to show that the finding of the JC on the credibility of the appellant's witnesses was plainly wrong. The finding was

also based on the evidence before the learned JC as could be seen in the appeal records. There was therefore no reason for the court to disturb the finding of the JC on this issue (see paras 29–32 & 35).

(2) The court agreed with the finding of the JC that since the second respondent's proposed settlement in the email appending the draft SD and the WhatsApp conversation did not materialise, the appellant could not rely on the contents of these documents to establish that the second respondent had admitted liability. In fact, the court would even hold that these documents and its contents were inadmissible in the first place. It was also trite that inadmissible evidence remained inadmissible even if no objections were taken by the parties. As such, the court was of the view that the learned JC was correct in holding that there was no admission of liability on the part of the second respondent (see paras 37 & 39–40).

(3) According to the respondents, MHP's title over the said land took precedence over the title claimed by the appellant. There was evidence to show that the appellant knew about the said charge at the time when she signed the SPA. Therefore, it was the respondents' case that an appeal against the decision of the High Court in the subsequent suits was bound to fail and that was the reason why the appellant was advised not to proceed with the appeal. In consideration of the decisions in the cases of *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650, *Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors* [2022] 1 MLJ 701; and *Rohaya bt Ali Haidar v Ambank (M) Berhad (dahulunya dikenali sebagai 'MBf Finance Berhad')* [2016] MLJU 32 ('the said cases'), the court was of the view that the learned JC was correct in his finding that the advice given by the second respondent to the appellant was sound. Therefore, there was no reason to hold that the second respondent had acted below the required standard of care of a reasonably competent advocate and solicitor when the appellant was advised not to file an appeal against the decision of the High Court in the subsequent suits. Ultimately, the court agreed with the JC's finding that the second respondent had not breached his duty of care towards the appellant. For the above reasons reasons, there was no merit in the first issue as well as the last issue (see paras 42–49 & 62).

(4) In relation to the second issue, the court opined that the learned JC was correct in his observation that when dealing with the claim for loss of chance, it was wrong for an advocate and solicitor to refute his client's claim by claiming that his client had a weak case. This was because, the question to be determined was not whether the appellant would have succeeded in her appeal against MHP but whether the respondent's negligence had occasioned the appellant to lose a valuable right, cause of action, chance or opportunity to claim her loss. Nonetheless, in the present appeal, the court agreed with the learned JC that 'the prospect of

success is so low that an appeal is negligible and does not justify any form of damages to be imposed against them'. This was based on the earlier finding of the learned JC that an appeal against the decision of the High Court in the subsequent suits was bound to fail with reference to the said cases. Therefore, the court dismissed this issue for lack of merits (see paras 52–53 & 56–58).

[Bahasa Malaysia summary

Melalui suatu perjanjian jual beli ('PJB'), perayu bersetuju untuk membeli sebidang tanah ('tanah tersebut') daripada seorang yang dikenali sebagai Normawati. Bagaimanapun, sebelum SPA ditandatangani, Normawati telah pun mencagarkan tanah tersebut kepada RHB Bank Bhd ('RHB') sebagai sekuriti untuk pinjaman dan apabila Normawati gagal membayar pinjamannya, RHB telah merampas tanah tersebut. RHB telah berjaya melelong tanah tersebut kepada My Home Properties Sdn Bhd ('MHP'). Untuk menyelesaikan pertikaian ini, perayu telah melantik responden kedua sebagai peguambelanya. Responden kedua ialah rakan kongsi dalam Tetuan Othman Hashim & Co ('responden pertama'). Responden kedua kemudiannya memfailkan dua tindakan bagi pihak perayu. Tindakan pertama ('saman awal') adalah untuk pelaksanan spesifik SPA dan tindakan ini berakhir memihak kepada perayu. Tindakan kedua adalah terhadap MHP untuk pengisytiharan bahawa perayu adalah pemilik sah tanah tersebut dan MHP juga telah memfailkan saman berasingan yang menuntut pemilikan tanah tersebut ('secara kolektif dirujuk sebagai 'saman berikutnya'). Bagi saman berikutnya, mahkamah membuat keputusan yang memihak kepada MHP, tetapi responden-responden menasihatkan perayu supaya tidak memfailkan rayuan terhadap keputusan tersebut. Perayu kemudian memfailkan saman terhadap responden-responden kerana kecuaian profesional, pelanggaran kewajipan fidusiari dan kehilangan peluang yang didakwa dialami oleh perayu akibat daripada nasihat responden-responden, yang didakwa bertentangan dengan kepentingan terbaik perayu sebagai anak guam mereka. Pesuruhjaya kehakiman yang bijaksana ('PK') menolak saman perayu, justeru rayuan semasa. Terdapat tiga isu yang perlu ditentukan oleh mahkamah. Pertama, berhubung dengan kecuaian profesional, perayu bergantung pada satu pertemuan antara perayu dan responden kedua ('pertemuan tersebut'), emel yang melampirkan draf akuan berkanun ('AB') serta mesej WhatsApp daripada responden kedua kepada suami perayu yang menunjukkan bahawa responden kedua bersetuju untuk memberi pampasan kepada perayu terhadap nilai pasaran semasa tanah tersebut sekiranya perayu bersetuju untuk tidak merayu terhadap keputusan dalam saman berikutnya. Perayu berhujah bahawa responden kedua telah bersetuju untuk membayar pampasan kewangan kepada perayu untuk tidak merayu terhadap keputusan dalam saman berikutnya kerana responden kedua ingin mengelakkan penghakiman bertulis Mahkamah Tinggi bahawa responden kedua telah melakukan fraud dengan tidak mendedahkan kejayaan lelongan tanah tersebut kepada MHP sebelum

penghakiman diumumkan dalam saman awal tersebut. Dalam erti kata lain, nasihat yang diberikan oleh responden kedua adalah bukan berdasarkan kewajipannya untuk bertindak demi kepentingan perayu sebagai anak guamnya. Kedua, berhubung isu kehilangan peluang, perayu berhujah bahawa perayu mempunyai peluang untuk berjaya jika rayuan difailkan. Isu terakhir ialah sama ada terdapat pelanggaran kewajipan fidusiari oleh responden-responden terhadap perayu.

Diputuskan, menolak rayuan dengan kos sebanyak RM15,000 kepada responden-responden tertakluk kepada alokator, dan mengesahkan keputusan Mahkamah Tinggi:

(1) Berkenaan dengan pertemuan tersebut, PK mendapati keterangan daripada saksi-saksi perayu adalah tidak kredibel. Sudah menjadi undang-undang yang mantap bahawa PK yang bijaksana, sebagai hakim perbicaraan, mempunyai kelebihan untuk melihat dan mendengar saksi-saksi dan berhak membuat dapatannya mengenai tingkah laku dan kredibiliti mereka. Ini adalah faedah yang tidak dimiliki oleh mahkamah semasa, sebagai mahkamah rayuan. Ia juga merupakan sesuatu yang sudah mantap bahawa dapatan hakim bicara tentang tingkah laku saksi-saksi dan kredibiliti keterangan saksi-saksi tidak sepatutnya diganggu melainkan mahkamah rayuan yakin bahawa dapatan tersebut adalah jelas salah. Tiada apa-apa di hadapan mahkamah untuk menunjukkan bahawa dapatan PK mengenai kredibiliti saksi-saksi perayu adalah jelas salah. Dapatan tersebut juga berdasarkan keterangan yang ada di hadapan PK yang bijaksana seperti yang dapat dilihat dalam rekod rayuan. Oleh itu, tiada sebab untuk mahkamah mengganggu dapatan PK mengenai isu ini (lihat perenggan 29–32 & 35).

(2) Mahkamah bersetuju dengan dapatan PK bahawa memandangkan cadangan penyelesaian yang dicadangkan oleh responden kedua dalam emel yang melampirkan draf AB dan perbualan WhatsApp tersebut tidak menjadi kenyataan, perayu tidak boleh bergantung kepada kandungan dokumen-dokumen ini untuk membuktikan bahawa responden kedua telah mengakui liabiliti. Malah, mahkamah juga akan memutuskan bahawa dokumen-dokumen ini dan kandungannya tidak boleh diterima daripada mula lagi. Ia juga merupakan suatu yang mantap bahawa keterangan yang tidak boleh diterima tetap tidak boleh diterima walaupun tiada bantahan dibuat oleh pihak-pihak. Oleh itu, mahkamah berpendapat keputusan PK yang bijaksana bahawa tiada pengakuan liabiliti di pihak responden kedua adalah betul (lihat perenggan 37 & 39–40).

(3) Menurut responden-responden, hak milik MHP ke atas tanah tersebut lebih diutamakan daripada hak milik yang dituntut oleh perayu. Terdapat keterangan untuk menunjukkan bahawa perayu tahu tentang

cagaran tersebut pada masa dia menandatangani PJB. Oleh itu, adalah menjadi kes responden-responden bahawa rayuan terhadap keputusan Mahkamah Tinggi dalam saman berikutnya pasti akan gagal dan itulah sebabnya mengapa perayu dinasihatkan untuk tidak meneruskan rayuan. Mengambil kira keputusan dalam kes-kes *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650, *Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors* [2022] 1 MLJ 701; dan *Rohaya bt Ali Haidar v Ambank (M) Berhad (dahulunya dikenali sebagai 'MBf Finance Berhad')* [2016] MLJU 32 ('kes-kes tersebut'), mahkamah berpendapat bahawa dapatan PK yang bijaksana bahawa nasihat yang diberikan oleh responden kedua kepada perayu adalah nasihat yang baik adalah betul. Oleh itu, tiada sebab untuk memutuskan bahawa responden kedua telah bertindak di bawah standard penjagaan yang diperlukan oleh peguam bela dan peguam cara yang cekap apabila perayu dinasihatkan untuk tidak memfailkan rayuan terhadap keputusan Mahkamah Tinggi dalam saman berikutnya. Akhirnya, mahkamah bersetuju dengan dapatan PK bahawa responden kedua tidak melanggar kewajipan berjaga-jaganya terhadap perayu. Atas sebab-sebab di atas, tiada merit dalam isu pertama dan juga isu terakhir (lihat perenggan 42–49 & 62).

(4) Berhubung dengan isu kedua, mahkamah berpendapat bahawa PK yang bijaksana adalah betul dalam pemerhatiannya bahawa apabila menangani tuntutan kehilangan peluang, adalah salah bagi peguam bela dan peguam cara untuk menyangkal tuntutan anak guamnya dengan mendakwa bahawa anak guamnya mempunyai kes yang lemah. Ini kerana, persoalan yang perlu ditentukan bukanlah sama ada perayu akan berjaya dalam rayuannya terhadap MHP tetapi sama ada kecuaian responden telah menyebabkan perayu kehilangan hak, kausa tindakan, atau peluang yang berharga untuk menuntut kerugiannya. Namun begitu, dalam rayuan semasa, mahkamah bersetuju dengan PK yang bijaksana bahawa 'the prospect of success is so low that an appeal is negligible and does not justify any form of damages to be imposed against them'. Ini berdasarkan dapatan PK yang bijaksana sebelum ini bahawa rayuan terhadap keputusan Mahkamah Tinggi dalam saman berikutnya pasti akan gagal dengan merujuk kepada kes-kes tersebut. Oleh itu, mahkamah menolak isu ini kerana kekurangan merit (lihat perenggan 52–53 & 56–58).]

Cases referred to

Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors [2022] 1 MLJ 701; [2022] 2 CLJ 1, FC (refd)

Chang Siew Lan (f) v Loh Chooi Teng (practising as Messrs CT Loh & Co a firm) [2009] 6 MLJ 776, FC (refd)

Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd [1992] 2 MLJ

650; [1992] 1 CLJ Rep 112, SC (refd)

Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals [2015] 1 MLJ 773, FC (refd)

Hijau Biru Envirotech Sdn Bhd v Tetuan Dzahara & Associates (sued as a firm) & Ors [2020] 5 MLJ 549, CA (folld)

Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650, CA (folld)

Lim Soh Wah & Anor v Wong Sin Chong & Anor & Another Appeal [2001] 2 CLJ 344, CA (refd)

Maelstrom Resources Sdn Bhd & Anor v Shearn Delamore (disaman sebagai firma) [2006] MLJU 473; [2007] 1 AMR 754, HC (refd)

Mount v Baker Austin (a firm) [1998] Lexis Citation 2479, CA (refd)

Muthiah a/l Ramasamy v Muguthan a/l Vadiveloo (sole practitioner in the name and style of Messrs Mugu & Sufyan & Co) [2022] MLJU 1028; [2022] 7 CLJ 940, HC (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (folld)

Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon) v Advance Specialist Treatment Engineering Sdn Bhd [2015] 1 MLJ 490, CA (folld)

Pembinaan SPK Sdn Bhd v Conaire Engineering Sdn Bhd-LLC & Anor and another appeal [2023] 2 MLJ 324, FC (refd)

Penang Port Commission v Kanawangi Seperumaniam [1996] 3 MLJ 427; [1997] 1 CLJ 423, CA (folld)

RHB Trustees Berhad v Oilfab Sdn Bhd & Anor [2015] MLJU 2085, HC (folld)

Rohaya bt Ali Haidar v AmBank (M) Bhd (previously known as 'MBf Finance Bhd') [2016] 2 MLJ 819; [2016] 4 CLJ 563, CA (refd)

Tenaga Nasional Bhd v Tetuan Ariff & Co [2014] 1 CLJ 1112, HC (refd)

Wong Kiong Hung & Anor v Chang Siew Lan (f) [2009] 4 MLJ 183, CA (refd)

Legislation referred to

Rules of Court 2012 O 92

Appeal from: *Premalla a/p Navanthapany Samy v Tetuan Othman Hashim & Co (a firm) & Anor* [2023] 11 MLJ 376 (High Court, Kuala Lumpur)

Latheefa Koya (with Zaid Abd Malek and Khairun Nabila Khairuddin) (Daim & Gamany) for the appellant.

Wong Hok Mun (with Tan Ying Xuan) (Azim, Tunku Farik & Wong) for the respondent.

Hashim Hamzah JCA:

INTRODUCTION

[1] This is the appellant's appeal against the decision of the learned judicial commissioner ('JC') in dismissing the appellant's claim for professional negligence and breach of fiduciary duty against the respondents.

BACKGROUND FACTS

[2] The appellant, in a sale and purchase agreement dated 5 January 2015 ('SPA'), agreed to purchase a piece of land known as PT 25974, HS(D) 96596, Mukim dan Daerah Petaling, Selangor Darul Ehsan ('the said land').

[3] However, the said land was already charged to RHB Bank Bhd ('RHB') as security for a loan by the seller, Normawati prior to the signing of the SPA. Normawati defaulted on her loan, leading to the foreclosure of the land by RHB and its subsequent auction to My Home Properties Sdn Bhd ('MHP').

[4] Later, the appellant engaged the second respondent as her counsel. The second respondent is a partner in the first respondent firm. In this case, the first respondent is being sued for vicarious liability for the second respondent's alleged professional negligence.

[5] Acting upon the appellant's instruction, the second respondent filed a personal caveat dated 30 April 2015 on the said land. Subsequently, the second respondent filed a suit in the High Court of Shah Alam against Normawati seeking, among other things, for specific performance of the SPA. The appellant's action was registered as Civil Suit No 22NCvC-451–08 of 2015 ('the initial suit'). In the initial suit, the High Court had granted an order for specific performance in favour of the appellant.

[6] Subsequently, the second respondent filed a suit on behalf of the appellant seeking for a declaration that the appellant is the rightful owner of the said land. MHP had also filed a separate suit claiming the same. The suits were registered as Civil Suit No BA-22NCvC-373–06 of 2016 and BA-22NCvC-188–03 of 2017 ('the subsequent suits'). Both of these suits were heard together before the High Court of Shah Alam.

[7] On 11 March 2019, after a full trial, the High Court delivered its judgment in favour of MHP and declared MHP to be the rightful owner of the said land. DW2, who was an advocate and solicitor from the first respondent firm, attended the proceeding for the appellant when the judgment was pronounced. DW2 had advised the appellant not to proceed with an appeal

against the said decision. This is the core issue in the present appeal, the details of which will be addressed later in this judgment.

[8] The appellant then filed a suit against the respondents for professional negligence, breach of fiduciary duty and loss of chance allegedly suffered by the appellant as a result of the respondent's advice, which was claimed to be against the appellant's best interest as their client.

[9] The learned JC dismissed the appellant's suit, hence this appeal.

[10] We pause here to note that the respondents had also filed an appeal against the decision of the learned JC in Civil Appeal No W-02(NCvC)(W)-85–01 of 2023. However, when the matter came up before us, the respondents decided to withdraw their appeal, and there was no objection from the appellant. We subsequently struck out the appeal with no order as to costs.

ISSUES

[11] Before us, the learned counsel for the appellant raised the following issues to be determined by this court, namely:

(a) whether the learned JC had erred in finding that the respondents had not acted in breach of their duty of care towards the appellant;

(b) whether the learned JC had erred in his finding that the respondents had not breached their fiduciary duty towards the appellant; and

(c) whether the learned JC had wrongly applied the doctrine of loss of chance in holding that the appellant would not have succeeded in her appeal even if an appeal was filed against the decision in the subsequent suits.

OUR FINDINGS

[12] We have perused the appeal records and heard the submissions from all parties in this appeal. We have reached a unanimous decision, and our decision is as follows.

First issue: Professional negligence

[13] First and foremost, in order to succeed in her claim for negligence against the respondents, the appellant must establish the following elements, namely:

(a) the respondents owe the appellant a duty of care;

(b) the respondents breach the duty of care;

(c) the appellant suffers damage; and

(d) the damage suffered by the appellant is not too remote.

[14] See *Wong Kiong Hung & Anor v Chang Siew Lan (f)* [2009] 4 MLJ 183 (CA). Leave to appeal was not granted as reported in *Chang Siew Lan (f) v Loh Chooi Teng (practising as Messrs CT Loh & Co a firm)* [2009] 6 MLJ 776 (FC). See also *Maelstrom Resources Sdn Bhd & Anor v Shearn Delamore (disaman sebagai firma)* [2006] MLJU 473; [2007] 1 AMR 754 (HC).

[15] At the outset, the respondents admitted, as they did in the High Court below, that their relationship with the appellant at the material time was that of a client-solicitor relationship. The respondents also admitted that they owed a duty of care towards the appellant.

[16] Richard Malanjum CJ (Sabah and Sarawak) (as he then was) speaking for the Federal Court in *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773 held as follows:

> [43] *Once a solicitor-client relationship exists* and thus a retainer, it *'put into operation the normal terms of the contractual relationship including in particular the duty' of the solicitor 'to protect the interests' of his client 'in matters to which the retainer relates by all proper means'* (see *Yong & Co v Wee Hood Teck Development Corporation*). (Emphasis added.)

[17] The appellant's complaint in the present case centres around the second respondent's legal advice not to appeal against the High Court's decision in the subsequent suits.

[18] In order to prove that the second respondent had breached his duty of care towards the appellant, the appellant must therefore prove that the second respondent's conduct had fallen short of the standard of care expected of a reasonably competent advocate and solicitor.

[19] This can be done by either calling any advocate and solicitor to testify as to what a reasonably competent advocate and solicitor would have done in a similar situation or not depending of the factual circumstances of the case.

[20] We affirm our earlier decision in *Hijau Biru Envirotech Sdn Bhd v Tetuan Dzahara & Associates (sued as a firm) & Ors* [2020] 5 MLJ 549 as follows:

A [78] Turning next to the standard of care, no doubt, in the sessions court the appellant did not call any advocate and solicitor to testify as to what a reasonably competent advocate and solicitor would have done in a similar situation.

[79] In this regard, we note that in *Shearn Delamore & Co v Sadacharamani Govindasamy* [2017] 1 MLJ 486; [2017] 2 CLJ 665; [2016] 6 AMR 797 (CA), *the* B *Court of Appeal had posited that a client who sues their former solicitors for professional negligence have the burden proving that the solicitor's conduct had fallen short of the standard of care of a reasonably competent solicitor and that this is to be done by calling an advocate and solicitor to satisfy the element of breach of the standard of care* (see also *Ngan Siong Hing v RHB Bank Bhd* [2014] 2 MLJ 449; [2014] 3 CLJ 984; [2014] C 1 AMCR 829; [2014] AMEJ 0062 (CA)).

[80] In *Shearn Delamore*'s case, the former client had contended that the solicitors were negligent in respect of legal opinions which they had given on the subject of intellectual property rights. The former client did not call any advocate and solicitor who specialised in intellectual property law to testify in court. The appeal was D allowed and the claim was dismissed.

[81] However, in *Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor* [2020] 4 MLJ 380; [2020] 5 CLJ 82; [2020] 3 AMR 317 (CA), Suraya bt Othman JCA speaking for *the Court of Appeal distinguished Shearn Delamore's case and stated that the failure to call an expert to testify as to the standard of care that is expected of an* E *advocate and solicitor is not fatal in every case* of professional negligence against an advocate and solicitor.

[82] *The issue in that case was a simple case*, which pertained to the duty of a practitioner to inform and advise the client of the consequence of non-payment of security for costs (which was ordered by the court) which would result in the case F being struck out (see para [64] of the judgment).

[83] Thus, applying the principles that may be culled from the cases mentioned above, and looking at all the circumstances, we are satisfied that in the present case, the failure on the part of the appellant to call an advocate and solicitor to testify on how a reasonably incompetent advocate and solicitor would have handled the G situation, is not fatal on the issue of breach of standard of care of a reasonably competent advocate and solicitor. (Emphasis added.)

[21] In the present case, it is the appellant's claim that the advice given by the second respondent was not based on the second respondent's duty to act in the H best interest of the appellant as their client. The appellant claimed that the second respondent wanted to preserve his reputation and avoid the High Court's written judgment that the second respondent had committed fraud by not disclosing the successful auction of the said land to MHP before the judgment was pronounced in the initial suit. Therefore, the appellant claimed I that the second respondent had breached his duty of care towards her.

[22] According to the learned counsel for the appellant, the second respondent expressed his real intention in a meeting held on 16 March 2019 ('the said meeting').

[23] In the said meeting, the second respondent allegedly agreed to compensate the appellant the current market value of the said land, which was RM460,000, if the appellant agreed not to appeal against the decision of the High Court in the subsequent suits.

[24] It was further submitted that the subsequent conduct of the second respondent after the said meeting had shown that the second respondent took active steps to ensure that the appellant will not appeal against the decisions in the subsequent suits in consideration for the agreed payment as follows:

(a) an email dated 15 May 2019 by the second respondent to the appellant appending a draft statutory declaration ('SD') which states that RM290,000 will be paid by the second respondent to the appellant in consideration for the appellant signing the SD and agreeing not to appeal against the decision of the High Court in the subsequent suits; and

(b) a WhatsApp message from the second respondent to the appellant's husband on 13 July 2019 stating, among other things, that the second respondent will pay RM290,000 to the appellant in consideration of the appellant signing the SD.

[25] The learned counsel for the appellant further submitted that there was no reason for the second respondent to draw up the draft SD if the advice not to appeal against the decision of the High Court in the subsequent suits was solely based on his legal opinion that an appeal was untenable.

[26] According to the learned counsel for the appellant, the only inference which can be deduced from the surrounding evidence is that the second respondent had agreed to compensate the appellant monetarily for not appealing against the decisions of the High Court in the subsequent suits because the second respondent wanted to avoid the High Court's written judgment that the second respondent had committed fraud by not disclosing the successful auction of the said land to MHP before the judgment was pronounced in the initial suit.

[27] The learned counsel for the appellant submitted that there was improper judicial appreciation of the evidence when the learned JC found that the respondents had not breached their duty of care towards the appellant and that the appellant had failed to prove that the second respondent was negligent, even when presented with the abovementioned evidence.

[28] We have perused the appeal records and the grounds of the learned JC's judgment. We do not agree with the submission by the learned counsel for the appellant on this issue for the following reasons.

[29] Firstly, regarding the said meeting, the learned JC found that the evidence from the appellant's witnesses was not credible (see paras 4650 of the learned JC's judgment). In particular, the learned JC found that the appellant herself gave unreliable evidence when she kept changing her position throughout the case (see para 79 of the learned JC's judgment). In addition, evidence has also shown that the appellant was only present for the earlier part of the meeting but had to leave shortly afterwards (pp 269 to 273 of encl 5).

[30] Evidence of PW3, who was supposed to be present during the said meeting, was also found to be not credible by the learned JC for the following reasons:

> 104. Nonetheless, I find that the plaintiff's third witness, PW3, had a longstanding personal relationship with the plaintiff and her husband. *He had appeared many times as a witness for the plaintiff in previous cases. It is also not clear why he was present at the said meeting and why his attendance was necessary in the first place. It is also not clear whether he was at the table where the discussion took place, or he was simply sitting at an ancillary table to the parties. This was not established by the plaintiff.* I, therefore, do not lend much credence to the evidence of the plaintiff's third witness, PW3, on this issue. (Emphasis added.)

[31] On this issue, it is trite that the learned JC, as the trial judge, had the advantage of seeing and hearing the witnesses and is entitled to his finding as to their demeanour and credibility. This is a benefit that we, as an appellate court, do not have.

[32] It is also trite that the finding of the trial judge as to the demeanour and credibility of the witnesses' evidence ought not be disturbed unless the appellate court is convinced that the finding is plainly wrong.

[33] We are guided by the decision of the Federal Court in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67 as follows:

> [80] Coming back to our present appeal, in reversing the decision of the High Court, *the Court of Appeal applied the 'plainly wrong' test and applied it in the sense of 'judicial appreciation of the evidence'*. In this respect, we reproduced the relevant paragraph of the judgment of the Court of Appeal:
>
> > [18] We are mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. *The general principle is that the conclusion of a trial judge is a finding of fact on the oral evidence based on the demeanour and credibility of the witnesses before him or her. Generally, such finding ought not be disturbed unless the appellate court is convinced that it is plainly wrong.* It would not be sufficient to warrant any interference merely because the appellate court entertains doubt whether such finding is right (see: *Lee Ing Chin & Ors v Gan Yook Chin* [2003] 2 MLJ 97; [2003] 2 CLJ 19, *Gan Yook Chin (P)*

& Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309).

[19] The appellate court must be slow to interfere with the findings made by the trial court unless it is shown that there was no judicial appreciation of the evidence adduced before it. (Emphasis added.)

[81] From the aforesaid, although *the Court of Appeal was correct in stating the principle to he applied in appellate intervention*, the issue is whether the observation by the Court of Appeal that there 'was no judicial appreciation of the evidence'is sustainable in view of the findings made by the learned trial judge. We will address this in the following paragraphs. (Emphasis added.)

[34] We also affirm our earlier decision in *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650 as follows:

... (f) it is also well settled that appeal is a rehearing of a case (see ss 29 and 69 of the Courts Judicature Act 1964 ('the CJA 1964')). *However, when a court sits in its appellate jurisdiction and interferes in the finding of facts of a trier of facts there is a duty and obligation to meticulously go through the pleadings, witnesses' evidence, notes of proceedings and very importantly, the memorandum of appeal in full, and provide grounds of judgment*. In *Coghlan v Cumberland* [1898] 1 Ch 704, the Court of Appeal stated that:

Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong.

(g) in such a case, *three things must appear from the judgment of the court exercising its appellate jurisdiction. They are as follows (i) the court has applied its mind to reasons given by the trier of facts; (ii) the court's cognisance that the trier of facts had the advantage of seeing and hearing the witnesses the benefit of which the appellate court do not have; (iii) the court must give cogent reasons for disagreeing with trier of facts*. There are a number of cases to support the proposition that no doubt an appellate court has undoubted jurisdiction to reconsider the oral evidence and reach a finding contrary to that arrived by the trial court or trier of facts (as the case may be) but this it can do only if the grounds of its judgment satisfied the three conditions stated above (see BN Bannerjee's *Law of Civil Appeals and Revision* (4th Ed) (1994) p 723) ... (Emphasis added.)

[35] Coming back to our present appeal, there is nothing before us to show that the finding of the learned JC on the credibility of the appellant's witnesses is plainly wrong. The finding is also based on the evidence before him as can be seen in the appeal records. There is therefore no reason for us to disturb the finding of the learned JC on this issue.

[36] Secondly, regarding the email appending the draft SD and the WhatsApp conversation, the learned JC found as follows:

> 112. *When I consider these two documents, it is obvious to me that the discussions centred around a proposal by the second defendant to settle the claims that the plaintiff may have against him and in return that the plaintiff agrees that she will not pursue any claims against the second defendant This was not agreed to by the plaintiff and the discussion fell through*.
>
> 113. Under those circumstances, *I cannot consider that the defendants had admitted to any form of liability to the plaintiff*. The plaintiff did not agree to the proposal for settlement and therefore could not be considered as a form of admission in any way against the defendants.
>
> ...
>
> 115. It is clear that the conditions as suggested by the second defendant were not agreed to by the plaintiff. *The plaintiff did not execute the statutory declaration and had chosen instead to pursue the claim against the defendants. Therefore, I cannot find that there was any form of admission as suggested by the plaintiff as the overtures made by the second defendant were clearly an attempt to settle the dispute*.
>
> 116. Having chosen not to agree to the terms offered, it is wrong for the plaintiff to now resurrect this issue through an alleged admission of liability. This allegation clearly contradicts the two documents that were written and produced by the second defendant at the material time. *There was also no response from the plaintiff or her husband to the email and the WhatsApp communication*. Therefore, for the above reasons, I do not believe that the plaintiff has proven her claim against the defendants. (Emphasis added.)

[37] We agree with the finding of the learned JC. Since the email appending the draft SD and the WhatsApp conversation contain the second respondent's proposal for the settlement of their dispute and the proposed settlement never materialised, the appellant cannot rely on the contents of these documents to establish that the second respondent had admitted liability. In fact, we would even hoid that these documents and their contents were inadmissible in the first place.

[38] We agree and adopt our learned brother Lee Swee Seng J's (as he then was) decision in *RHB Trustees Berhad v Oilfab Sdn Bhd & Anor* [2015] MLJU 2085 as follows:

> The use of the label 'Without Prejudice' is common in many *correspondence between parties especially when there are terms of a settlement that are being proposed* with parties posturing and positioning themselves and proffering options and concessions along the way. *The law has thus developed that such communications made on a without prejudice basis shall be excluded from the evidence to be produced at trial if a settlement does not materialise; otherwise no parties would want to negotiate at all for fear that what is proposed in the process of negotiation would be led in evidence by the party trying to gain an advantage to prove its case to the detriment of the other*.

Such a principle is well entrenched in many cases. Suffice to refer to just a few here. The Federal Court in *Malayan Banking Bhd v Foo See Moi* [1980] 2 MLJ 17 speaking through His Lordship Chang Min Tat FCJ said at p 18:

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement ...
>
> ... *Conversely a without prejudice communication even if not expressly stated to be such, would be precluded from being disclosed at a trial for so long as there were negotiations towards a settlement. Sinojaya Sdn Bhd v Metal Component Engineering Pte Ltd* [2003] 1 SLR 281 ... (Emphasis added.)

[39] It is also trite that inadmissible evidence remains inadmissible even if no objections were taken by the parties. More recently, Her Ladyship Mary Lim FCJ speaking for the Federal Court in *Pembinaan SPK Sdn Bhd v Conaire Engineering Sdn Bhd-LLC & Anor and another appeal* [2023] 2 MLJ 324 held as follows:

> [29] The admission of a translation, or of any of the four translations required under O 92 of the Rules of Court 2012 for that matter, does not ipso facto admit the copy of the original Abu Dhabi judgment which remains intrinsically inadmissible for want of compliance with ss 78 or 86. *It is settled law that inadmissible evidence remains inadmissible even if no objections were taken by the parties*; more so when erroneously admitted contrary to the relevant principles under the Evidence Act — *see Supreme Court in Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation* [1986] 2 MLJ 124. (Emphasis added.)

[40] Hence, we are of the considered view that the learned JC was correct in holding that there was no admission of liability on the part of the second respondent.

[41] The respondents, on the other hand, denied the appellant's allegation and stated that the advice not to appeal was based on the current position of the law.

[42] According to the learned counsel for the respondents, MHP's title over the said land takes precedence over the title claimed by the appellant. the said land was charged to RHB Bank as security for a loan prior to the signing of the impugned SPA. Subsequently, Normawati defaulted on her loan and the said land was foreclosed. As a result, the land was successfully auctioned off to

MHP. There was also evidence to show that the appellant knew about the said charge at the time when they signed the impugned SPA.

[43] Similar is the facts in *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650; [1992] 1 CLJ Rep 112 (SC) in which the Supreme Court ultimately held that:

> ... *any dealing subsequent to the charge* and *with notice of the charge*, as here, *cannot defeat the indefeasible interest* of the *registered chargee and through him the purchaser at a judicial sale*. (Emphasis added.)

[44] See also *Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors* [2022] 1 MLJ 701; [2022] 2 CLJ 1 (FC) and *Rohaya bt Ali Haidar v AmBank (M) Bhd (previously known as 'MBf Finance Bhd')* [2016] 2 MLJ 819; [2016] 4 CLJ 563 (CA).

[45] Therefore, it is the respondents' case that an appeal against the decision of the High Court in the subsequent suits was bound to fail and that was the reason why the appellant was advised not to proceed with the appeal.

[46] We are of the considered view that the learned JC was correct in his finding that the advice given by the second respondent to the appellant was sound in consideration of all of the above authorities.

[47] Therefore, there is no reason to hold that the second respondent had acted below the required standard of care of a reasonably competent advocate and solicitor when the appellant was advised not to file an appeal against the decision of the High Court in the subsequent suits. Ultimately, we agree with the finding of the learned JC that the second respondent had not breached his duty of care towards the appellant.

[48] In a nutshell, based on the foregoing reasons, we disagree with the learned counsel for the appellant that there was improper judicial appreciation of evidence by the learned JC. We are of the considered view that the findings of the learned JC were supported with overall evidence adduced before him. In addition, we do not see any appealable errors committed by the learned JC when he found that the second respondent had not breached their duty of care towards the appellant.

[49] There is therefore, no merits in this issue.

Second issue: Loss of chance or opportunity

[50] It is trite that damage is an essential element in any cause of action for negligence, in order to succeed in her claim against the respondents, the appellant must be able to prove that loss have actually occurred and that it is recoverable before an award of damages can be made. We affirm our earlier decision in *Penang Port Commission v Kanawangi Seperumaniam* [1996] 3 MLJ 427; [1997] 1 CLJ 423 as follows:

> [5] *Damages are not awarded simply because the plaintiff has thrown them at the head of the court. The loss must be shown to have actually occurred and also be recoverable in law before an award can be made*. In the absence of these materials the trial judge must have erred in law in refusing the appellant's application for a stay of execution. (Emphasis added.)

[51] Before us, the learned counsel for the appellant submitted that the appellant had a chance of success if an appeal was filed.

[52] On this issue, we are of the view that the learned JC was correct in his observation that it is wrong for an advocate or solicitor to refute his client's claim by claiming that his client has a weak case when dealing with loss of chance claim.

[53] This is because the question to be determined is not whether the appellant would have succeeded in her appeal against MHP but whether the respondent's negligence has occasioned the appellant to lose a valuable right, cause of action, chance or opportunity to claim her loss. See *Lim Soh Wah & Anor v Wong Sin Chong & Anor & Another Appeal* [2001] 2 CLJ 344 (CA), *Tenaga Nasional Bhd v Tetuan Ariff & Co* [2014] 1 CLJ 1112 (HC) and *Muthiah a/l Ramasamy v Muguthan a/l Vadiveloo (sole practitioner in the name and style of Messrs Mugu & Sufyan & Co)* [2022] MLJU 1028; [2022] 7 CLJ 940 (HC).

[54] In the UK Court of Appeal case of *Mount v Baker Austin (a firm)* [1998] Lexis Citation 2479, two firms of solicitors sued by the appellant had successively caused the appellant's claims to be struck out for want of prosecution. The firms had also failed to advise the appellant as to the hopelessness of his claim whilst they were respectively acting for him. On this, Simon Brown LJ stated:

> With these considerations in mind I would state the applicable principles as follows:
>
> (a) *The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim (or defence to counter-claim) he has lost something of value ie. that his claim (or defence) had a real and substantial rather than merely a negligible prospect of success*. (I say 'negligible' rather than 'speculative' — the word used in a somewhat different context in *Allied Maples Group Limited v Simmons & Simmons* [1995] 1 WLR 1602 — lest 'speculative' may be thought to include considerations of uncertainty of outcome,

considerations which in my judgment ought not to weigh against the plaintiff in the present context, that of struck-out litigation.)

(b) *The evidential burden lies on the defendants to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out*. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position and heavier still where, as here, two firms of solicitors successively have failed to do so. If, of course, the solicitors have advised their client with regard to the merits of his claim (or defence) such advice is likely to be highly relevant.

(c) *If and insofar as the court may now have greater difficulty in discerning the strength of the plaintiff's original claim (or defence) than it would have had at the time of the original action, such difficulty should not count against him, but rather against his negligent solicitors*. It is quite likely that the delay will have caused such difficulty and quite possible, indeed, that that is why the original action was struck out in the first place. That, however, is not inevitable: it will not be the case in particular (a) where the original claim (or defence) turned on questions of law or the interpretation of documents, or (b) where the only possible prejudice from the delay can have been to the other side's case.

(d) *If and when the court decides that the plaintiff's chances in the original action were more than merely negligible it will then have to evaluate them. That requires the court to make a realistic assessment of what would have been the plaintiffs prospects of success had the original litigation been fought out*. Generally speaking one would expect the court to tend towards a generous assessment given that it was the defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure. To my mind it is rather at this stage than the earlier stage that the principle established in *Armory v Detamirie* (1722) 1 Stra. 505 comes into play.

With some regret, however, I conclude that the application of these principles cannot avail the appellant here. He would inevitably have lost his claim against Lloyds Bank: that is plain as a matter of law on the unambiguous wording of the guarantee. Similarly, he would have failed to defeat the Bank's counter-claim for interest: the contemporary documents were wholly inconsistent with his case that Mr Godfrey the local bank manager, had committed the Bank to waive all interest due to it under the guarantee. The passage of time has in no way increased the appellant's difficulties in this regard; if anything, Mr Godfrey's death in January 1985 had removed one obstacle from his path. The plain fact is that the documents and surrounding circumstances were insuperable. Surprising and highly unsatisfactory though it is, I must conclude that both firms of solicitors were negligent *not merely in allowing the appellant's successive claims to be struck out but also in not having properly advised him as to their worthlessness*. Heavy though it was, the respondents here discharged the evidential burden upon them.

I too, therefore, would dismiss this appeal.

[55] We affirm our earlier decision in *Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon) v Advance Specialist Treatment Engineering Sdn Bhd* [2015] 1 MLJ 490 as follows:

> [9] In addition, it must be noted when a matter is struck out there will be at least two types of damages for client. One is actual damage for costs to reinstate or refilling inclusive of instructing new solicitors to take conduct of the matter as the case may be and the other the 'loss of chance to sue'. To say 'actual damage' will not arise upon the case being struck out is a fact quite difficult to comprehend. *However, on the second part of 'loss of chance' there will not be any liability if there is no actual loss and/or reasonable prospect of success as advocated in the submission of the appellant*. (Emphasis added.)

[56] On this issue, we agree with the learned JC that 'the prospect of success is so low that an appeal is negligible and does not justify any form of damages to be imposed against them'.

[57] At the risk of repetition, this is based on the earlier finding of the learned JC that an appeal against the decision of the High Court in the subsequent suits was bound to fail with reference to the cases of *Gondola Motor Credit Sdn Bhd*, *Bayangan Sepadu Sdn Bhd* and *Rohaya Ali Haidar*. We see no reason to depart from his findings.

[58] Therefore, we would hereby dismiss this issue for lack of merits.

Third issue: Whether there is a breach of fiduciary duty by the respondents against the appellant

[59] The learned counsel for the appellant submitted that the second respondent had breached his fiduciary duty against the appellant for the same reason above. It was further submitted that the learned JC erred in holding that the respondents did not breach any fiduciary duty to the appellant on the same ground.

[60] It is important to note at the outset that the learned JC had made a remark in his grounds of judgment that the learned counsel for the appellant had notified the court that the appellant would not be pursuing her claim for breach of fiduciary duty against the respondents.

[61] Regardless of the above, the appellant relied on the same facts above to establish that the second respondent had breached his fiduciary duty towards the appellant.

[62] Since our finding is concurrent with the learned JC that the second respondent's advice not to appeal against the decision of the High Court in the

A subsequent suits was objective and had not fallen short of the standard of care expected of a reasonably competent advocate and solicitor, we found this issue to be devoid of merits.

CONCLUSION

B

[63] In conclusion, based on all of the above, we found no merits in the appellant's appeal. We hereby dismiss the appeal with costs of RM15,000 to the respondents subject to allocator. The decision of the High Court is hereby affirmed.

C

Appeal dismissed with costs of RM15,000 to respondents subject to allocator; decision of High Court affirmed.

Reported by Dzulqarnain Ab Fatar

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